

United States District Court
EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

FIDELIS DIAGNOSTICS, INC.

v.

SAFEGUARD SERVICES, L.L.C.,
KATHLEEN SEBELIUS, PALMETTO GBA,
and DONALD BERWICK, M.D.

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Case No. 4:10-CV-638
Judge Schneider/Judge Mazzant

**MEMORANDUM ADOPTING REPORT AND
RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE**

Came on for consideration the report of the United States Magistrate Judge in this action, this matter having been heretofore referred to the United States Magistrate Judge pursuant to 28 U.S.C. § 636. On November 4, 2011, the report of the Magistrate Judge was entered containing proposed findings of fact and recommendations that Defendants' Motion to Dismiss Plaintiff's Second Amended Complaint for Lack of Subject Matter Jurisdiction Under Rule 12(b)(1) and for Failure to State a Claim Under Rule 12(b)(6) (Dkt. #40) be granted in part and denied in part.

Having received the report of the United States Magistrate Judge, and no objections thereto having been timely filed, this Court is of the opinion that the findings and conclusions of the Magistrate Judge are correct and adopts the Magistrate Judge's report as the findings and conclusions of the Court.

It is, therefore, **ORDERED** that Defendants' Motion to Dismiss Plaintiff's Second Amended Complaint for Lack of Subject Matter Jurisdiction Under Rule 12(b)(1) and for Failure to State a Claim Under Rule 12(b)(6) (Dkt. #40) is **GRANTED** in part and **DENIED** in part.

Plaintiff's claims for violating the Medicare Act, violating the Administrative Procedure Act, violating Plaintiff's due process rights, declaratory judgment, and mandamus are **DISMISSED** without prejudice. Plaintiff may refile its claims, if it chooses to do so, following exhaustion of its administrative remedies under the Medicare Act.

It is SO ORDERED.

SIGNED this 29th day of November, 2011.

A handwritten signature in black ink, reading "Michael H. Schneider", written over a horizontal line.

MICHAEL H. SCHNEIDER
UNITED STATES DISTRICT JUDGE